In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 557

UNITED STATES OF AMERICA, APPELLANT

v.

INTERNATIONAL MINERALS AND CHEMICAL CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

REPLY BRIEF FOR THE UNITED STATES

Appellee correctly points out in its brief (pp. 11–12) that our opening brief mistakenly refers to a memorandum of the staff of the Department of Health, Education and Welfare as a memorandum of the staff of the House Committee on the Judiciary. It is also true that the memorandum and the letter from HEW, to which it was attached,[1] supported the original position of the Interstate Commerce Commission that the *scienter* element should be deleted entirely from 18 U.S.C. 834 in order to establish absolute liability for violation of regulations for transportation of explosives and other dangerous substances.

[1] The letter and memorandum were reprinted in the House Committee Report, H. Rep. No. 1975, 86th Cong., 2d Sess., pp. 13–19.

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These matters are not, however, essential to our position on the legislative history of the 1960 revision of the Act. The ultimate point to be made about that legislative history is that it is neutral; the 1960 revision retained the prior framework and the prior use of the term "knowingly" and nothing said by Congress in the process indicates a legislative intent that specific knowledge of a regulation should be a prerequisite to punishment for its violation. Rather, it is clear that the intent was, as the House Committee Report stated, simply "to retain the present law." H. Rep. No. 1975, 86th Cong., 2d Sess., p. 2. And the "present law," as we have argued in our opening brief, pp. 7–14, required only proof of the traditional element of *scienter*—that the defendant was aware of the pertinent facts and intended to engage in the conduct involved.

Nor does the legislative history as a whole indicate that Congress *thought* knowledge of the regulations was required by prevailing judicial decisions. The House Committee Report noted that "[u]nder the present law there is judicial pronouncement as to the standards of conduct that make a violation a 'knowing' violation" (H. Rep. No. 1975, 86th Cong., 2d Sess., p. 2). The Report did not state that the Committee's interpretation of this "judicial pronouncement" was that knowledge of the regulations was an element of the offense. It merely asserted that the change in the *scienter* requirement proposed by the Senate—to require only a general awareness of the

existence of safety regulation—"may well create an almost absolute liability" (*ibid.*). This statement does indicate that it was the Committee's view that the proposed substitution of this requirement for "knowingly" would, as a practical matter, be nearly as effective in creating absolute liability as simply deleting the term "knowingly." It was certainly plausible to view the proposed *scienter* requirement—of general knowledge of the existence of regulations but evidently not knowledge of the facts—as less stringent than a requirement of a knowledge of the facts, but not of the regulations. Thus, the statement does not indicate that the House Committee thought that "knowingly" required knowledge of both the facts and the regulations.[2]

The comments of various governmental agencies (reprinted in the House Committee Report), which supported revision of the statute, did not reflect a unanimous view of the requirements of the present law. The Interstate Commerce Commission was concerned that the decision in *Boyce Motor Lines* v.

[2] The bill, as revised by the House Committee, passed the House on August 23, 1960 (106 Cong. Rec. 17261–17262). The Senate passed the amended House version three days later (106 Cong. Rec. 17789). Senator Magnuson, the sponsor of the original bill, urged prompt acceptance of the "minor House amendments" as an "emergency" measure to make certain that federal courts would have jurisdiction over private, as well as common, carriers. He noted several recent explosions of trucks of private carriers, one in Roseburg, Oregon, which killed 37 people. He also pointed out that a federal district court in Portland had the day before dismissed a suit which the government had filed, apparently in connection with the Roseburg disaster, for lack of jurisdiction.

United States, 342 U.S. 337, had "been relied upon by defense attorneys and to some extent by the courts as requiring the establishment of some mental element or affirmative intention to evade the law in addition to knowledge of the facts" H. Rep. No. 1975, 86th Cong., 2d Sess., p. 9. It initially sought a statute which would create absolute liability by omitting altogether any reference to intent or knowledge, whether of law or fact. It was satisfied with a revision which it believed lessened its burden in prosecution and clarified what it considered to be an uncertain state of law.

The HEW staff memorandum argued—persuasively we believe—that the existing and correct judicial interpretation of the effect of the term "knowingly" was that it required proof only of the traditional element of *scienter*. While it supported deletion of any *scienter* requirement, it viewed the burden of proof of knowledge of the existence of regulations as more burdensome than proof of factual knowledge. The staff therefore apparently felt that retention of "knowingly" in Section 834—which, it noted, was in any event to be retained in Sections 832 and 833—was preferable to substitution of the Senate version.

The significant point is thus that there was a disparity of views as to the requirements of the existing law, as well as the burden which the *scienter* requirement proposed by the Senate would impose. In this context, we submit, it is not reasonable to conclude that Congress held the inaccurate view that the present statute required proof of knowledge of the law, as well as the facts, and that it consequently intended

to endorse this interpretation by retaining the term, "knowingly." Accordingly, nothing which Congress said or did should prevent this Court from reaffirming the correct construction of the term "knowingly" as continuously used in Section 834, and reversing the judgment below.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JOHN F. DIENELT,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
CRAIG M. BRADLEY,
Attorneys.

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